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FILED
FEB 18 1931
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In the

Supreme Court of the United States

OCTOBER TERM, 1930

G. E. HERRON,
Appellant,
vs.
SOUTHERN PACIFIC COMPANY, a Corporation;
Appellee.

No. 131
(October Term, 1929—No. 914)

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

FOREWORD:

This cause was tried in the United States District Court for the District of Arizona and resulted in a directed verdict in favor of the defendant, because of the contributory negligence of the plaintiff. From the judgment on the verdict in favor of the defendant the plaintiff appealed to the United States Circuit Court of Appeals for the Ninth Circuit. The latter Court, on March 3, 1930, as shown by the printed certificate on file herein, held the plaintiff to be guilty of contributory negligence as a matter of law, and stated:

> "If the court below was at liberty to follow the settled rule in the courts of the United States, that

whenever, in the trial of a civil case, it is clear that the state of the evidence is such as not to warrant a verdict for a party, and that if such a verdict were rendered the other party would be entitled to a new trial, it is the right and duty of the judge to direct the jury to find according to the views of the court (Barrett v. Virginian Ry. Co., 250 U. S. 473-6), the ruling of the court below in directing the verdict was justified and free from error. But Section 5 of Article 18 of the Constitution of the State of Arizona provides: 'The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury'."

The Circuit Court of Appeals certifies to the Supreme Court only one question and that is:

"Therefore, for a proper decision of the above entitled cause, now pending on appeal and duly submitted for consideration, instructions are respectfully requested of the Supreme Court on the following important and controlling question of law, concerning which we are in doubt, viz:

First: Is the above provision of the Constitution of the State of Arizona binding and controlling upon a federal court sitting in that state? Or, putting the question in another form:

Second: May a federal court sitting in the State of Arizona direct a verdict for the defendant in an action to recover damages for personal injuries, when it appears as a matter of law that the plaintiff was guilty of contributory negligence, notwithstanding the state constitutional provision to the contrary?"

ARGUMENT

Appellant G. E. Herron, through his counsel, has filed a brief herein, contending that the certified question should be answered to the effect that the above quoted provision of the Arizona Constitution is binding and controlling upon a federal court and that the district court is prohibited from directing a verdict on the grounds of contributory negligence. In support of his argument appellant cites Inspiration Consolidated Copper Company vs. Conwell, 21 Ariz. 480, 190 Pac. 88, and other Arizona cases construing the section of the constitution in question. In the Inspiration case the court stated that were it not for the State Constitution it would have been the duty of the trial court to set aside the verdict on the ground of assumption of risk, but that the constitutional provision is plain and that its evident purpose is to make the jury the sole arbiter of the existence of contributory negligence or assumption of risk, no matter what the state of the evidence may be. At first the Supreme Court of Arizona liberally applied the constitutional provision in question and made same applicable to any state of the evidence. As we read later decisions of the Arizona Court it is evident that the unjust encroachment upon the province of the court and judge, effected by this provision, has been felt, and its rigors have been lessened. The very late case of Franco vs. Vakares, (Ariz. 1929) 277 Pac. 812, clearly indicates the trend of opinion in the Arizona Courts. That was a suit by the administrator of a guest riding in an automobile against the owner and driver of the car for the death of the guest, resulting from a collision of the automobile and a street car. There was no question of the negligence of the driver—he was drunk and recklessly drove into the street car. However, the proof further

showed that the deceased knew that the driver was drunk, and had furnished some whiskey to aid in the intoxication. The Supreme Court stated:

> "On the issue of contributory negligence, the court under section 5, art. 18, of the Constitution, would have properly submitted the case to the jury if that had been the only issue. That section provides that the defense of contributory negligence is one of fact and to be left to the jury at all times. Whatever the state of the testimony, contributory negligence must always go to the jury when made an issue. *It would seem, however, that, where the facts uncontrovertedly convict the plaintiff's intestate of contributing to his own injury and death, as they do in this instance, the court should have exercised its discretion upon a motion for a new trial to vacate and set aside the verdict for that ground.* * * *
>
> "We think the court should have granted defendant's motion for a directed verdict at the close of the case on the ground that the evidence conclusively and without conflict showed that the plaintiff's intestate was guilty of independent negligence." (Italics ours.)

Such decision can only be interpreted one way—the Supreme Court of Arizona has held that the constitutional provision does not apply where the facts uncontrovertedly disclose contributory negligence on the part of the plaintiff and that when the facts are uncontroverted, then the question is one of law for the court. That is not so materially different from the rule applied in the federal court—when reasonable men can come to only one conclusion then negligence is a question of law. Under the reasoning of Franco vs. Vakares, we have no doubt the

Arizona court would have ordered a directed verdict in this Herron case.

The above comment on the decisions of the Arizona court is only for the purpose of showing the modern trend of the Court to consider itself not strictly bound by the constitutional provision. It is our contention that a federal court is not bound or controlled by such provision of the Arizona Constitution, regardless of any construction placed upon same by the Arizona court. The provision lays down a rule of substantive law, rather than one pertaining to procedure, and is not required to be observed by a federal court under the Conformity Act. (28 U. S. C. A. 724).

Appellant, in the court below, and in this court, in his brief cites the decision of the United States Circuit Court of Appeals for the Ninth Circuit, in Southern Pacific Company vs. Martinez, 270 Fed. 770, as being an authority holding that the constitutional provision in question is binding and controlling on a federal court. However, the same Circuit Court of Appeals, in a later case, A., T. & S. F. Ry. Co. vs. Spencer (9th Cir. 1927) 20 Fed. (2nd) 714, decisively held that in the Martinez case the question now involved was not passed upon and the only point decided was that the evidence was not clearly sufficient to compel an instructed verdict under the rule of courts of the United States. And in such Spencer case, the Circuit Court of Appeals further stated:

> "It is our opinion that the constitutional provision in Arizona lays down a rule of substantive law, rather than one pertaining to remedy or of procedure. Pritchard v. Norton, 106 U. S. 124, 1 S. Ct. 102, 27 L. Ed. 104. It cuts deep into the right, observed at common law, by which a defendant can

obtain a decision by the court upon a proven state of facts. What is, at common law, within the power of the judge of the court to decide, is in all cases left to the jury, and their finding is conclusive on the court. Thus, although by the law of the place where an injury has been inflicted the power and duty of the judge are to pass upon a clearly established state of facts, a litigant may avoid the consequences of the exercise of those functions by going into a jurisdiction where the fundamental local law strips the court of that power by making the jury the sole arbiter of a question with conclusive force upon the court.

"It seems clear that such provision is essentially substantive, and the federal conformity statutes do not require its application."

We call attention to the fact that the Spencer case, above mentioned, has been cited by annotators as an authority for the text that the Arizona constitutional provision is substantive and need not be applied under the Conformity Act.

2 Cyc. Fed. Procedure, Sec. 459, p. 608;
28 U. S. C. A. 724, p. 68.

And, of course, it is apparent the Circuit Court of Appeals did not pass upon the matter in the Martinez case, because such court has certified the question to this Supreme Court.

Appellant also cites the case of Chicago, Rock Island & Pacific Ry. Company vs. Cole, 251 U. S. 54; 40 S. Ct. 68; 64 L. Ed. 133. The Oklahoma Constitution contains a provision similar to that of Arizona now in question, but the Cole case did not undertake to decide whether

the same was binding on a federal court. It went no further than to hold the provision of the Oklahoma Constitution to be not violative of the Federal Constitution. The Cole case went to the Supreme Court of the United States on writ of error to the Supreme Court of the State of Oklahoma. The constitutional provision was attacked on the ground that it violated the due process clause of the Federal Constitution. And the Supreme Court of the United States held the same constitutional insofar as it *governs the state courts* but its effect upon a federal court was not in question. The Supreme Court said:

> "There is nothing, however, in the Constitution of the United States or its Amendments, that requires *a state to maintain the line with which we are familiar between the functions of the jury and those of the court.*" (Italics ours.)

This decision indicates that a state may, insofar as its own courts are concerned, destroy the line between functions of the court and jury, but does not hold that a state can enforce such destruction upon the federal court. On the contrary, it strongly implies that such a rule will not be followed by a federal court, although a state may enforce it upon its own courts.

Appellant contends that if the federal court is not bound to enforce the Arizona provision under the Conformity Act, then it must apply the same by virtue of section 721, Revised Statutes of the United States, 28 U. S. C. A. 725, reading:

> "725. **Laws of State as rules of decision.** The laws of the several states, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of

decision in trials at common law, in the courts of the United States, in cases where they apply."

The constitutional provision is not a rule of decision to be followed by a federal court under section 725. Such section requires a federal court to follow state laws as rules of decision only in cases when the matter is peculiarly subject to local law, such as construction of state statutes, property rights, titles, validity of contracts and wills, and the like.

2 Cyc. Fed. Pro. Sec. 405, p. 466;
28 U. S. C. A. 725 and annotation.

The meaning of this section relative to rules of decision is well illustrated in Edward Hines, Trustee vs. Martin, (1925) 268 U. S. 459; 69 L. Ed. 1050:

"Both the meaning of statutes of a state and the rules of the unwritten law of a state affecting property within the State are peculiarly questions of local law, to be ascertained and established by the state courts. For that reason federal courts ordinarily hold themselves bound by the interpretation of state statutes by the state courts."

and in Tweeten vs. Tacoma Railway & Power Co., (1914) 210 Fed. 828:

"Here is a situation which seems to demand remedial legislation; for, while the courts of the United States will follow the decisions of the courts of the state in which they are held when, in construing the common law, those decisions establish a rule of property, *they must ignore them when they establish no more than a rule of liability for personal injuries.*" (Italics ours.)

The constitutional provision relative to contributory negligence does not establish any rule of property, right or title, constituting a rule of decision to be followed by a federal court. It is a provision designed to destroy the line of demarcation between functions of court and jury. It undertakes to dictate what functions the court shall exercise and what functions the jury shall exercise. In practice it effects and enforces a rule of presumption in that it states that the testimony shall at all times and under all conditions be sufficient to raise an issue of fact. It establishes a rule that is unquestionably a matter of substantive law and not procedure—but is not a *rule of decision* affecting property, contracts or fundamental liability. It is an effort to dictate to a federal court the terms and manner under which it will direct a verdict, instruct a jury or grant a new trial. It has been definitely settled that the federal courts will not follow such a rule.

Appellant cites Byrne vs. Kansas City F. S. & M. R. Co., 61 Fed. 605, giving effect to a statute of the State of Tennessee, which had been construed by the state courts as rendering proof of contributory negligence not a complete bar to an action but only a circumstance to be considered in mitigation of damage. The state of Tennessee did not undertake to define what constituted contributory negligence nor to prohibit the court from deciding as a matter of law what is contributory negligence—but on the contrary it entirely abolished the defense except as a mitigating circumstance as to the amount of damage. That is an entirely different matter than before us. If the state of Arizona enacted a statute entirely abolishing the defense of contributory negligence in a personal injury action, such a statute, unless the same was unconstitutional, would be a rule of decision to be followed by

the federal court. It would provide a new right or abolish a previous liability, as you may view it, and would constitute a fundamental right to be recognized by a federal court. For instance, the Arizona Employers' Liability Act, a special statute applying to employer and employee in certain specified hazardous occupations, entirely abolishes the defense of assumption of risk and of ordinary contributory negligence. Such Employers' Liability Act has been followed by the federal court as a rule of decision under section 725 above referred to, and properly so, as a fundamental right had been established by statute. But the State of Arizona has never abolished contributory negligence as a defense in ordinary negligence actions, such as crossing accidents (as the present case), but on the contrary the state courts have not only recognized contributory negligence as a defense but have held the same to be an effective and complete bar to recovery.

Franco vs. Vakares, (Ariz. 1929) 277 Pac. 812;

So. Pac. Co. vs. Fisher, (Ariz. 1929) 274 Pac. 779;

Morenci So. Ry. Co. vs. Monsour (1919) 21 Ariz. 148; 185 Pac. 938;

White vs. Ariz. Eastern R. R. Co. (1926) 30 Ariz. 151; 245 Pac. 270.

The provision of the Arizona Constitution in question does not abolish a defense but undertakes to dictate who shall be the arbiter of the sufficiency of the evidence to establish the same.

The United States Supreme Court has declared on numerous occasions that it will not accept such dictation. A case closely analogous is that of states attempting to govern the terms and conditions under which verdicts shall be instructed. The generally accepted rule of

federal courts as to instructed verdicts is, where the evidence is undisputed or clearly preponderant upon a question of negligence or contributory negligence, and the court, in the exercise of its sound discretion, would be compelled to set aside a verdict returned in opposition, then it is the duty of the court to instruct a verdict.

Delaware, Lackawanna & Western R. R. Co. vs. Converse, 139 U. S. 469;

So. Pac. Co. vs. Pool, 160 U. S. 438.

In Barrett vs. Virginian Ry. Co., 250 U. S. 473; 63 L. Ed. 1092, the Supreme Court of the United States, after reciting the above rule of courts of the United States relative to instructed verdicts, states:

> *"And this rule is not subject to modification by state statutes or constitutions."* (Italics ours.)

We believe that the Barrett case is conclusive on the question before us. In positive language the Supreme Court held that the federal rule was to instruct a verdict when the evidence was undisputed or clearly preponderant and that such rule was not subject to modification by state law. The Arizona provision is nothing more than a command to the court that in the particular matter of contributory negligence you shall not instruct a verdict, even if the evidence is undisputed and clearly preponderant and even if the court would be compelled to grant a new trial.

New Amsterdam Casualty Co. vs. Farmers Co-op. Union, 2 Fed. (2d) 214.

Another very strong point in support of our contention is the fact that the laws of the United States expressly provide that all United States courts shall have

the power to grant new trials for reasons for which new trials have usually been granted in courts of law. 28 U. S. C. A. 391. Congress by enactment, having provided for granting of new trials, federal courts in such regard, could not under any condition be affected by state statutes, laws or practices governing the same matter.

McDonald vs. Pless, 238 U. S. 264;
Latchtimacker vs. Jacksonville (1910) 181 Fed. 276;
City of Detroit vs. Grummond (1914) 216 Fed. 273.

If this case had gone to the jury and a verdict had been returned for the plaintiff the district court would have granted a new trial for reasons for which new trials have usually been granted in courts of law, i. e., uncontroverted evidence of contributory negligence—and in the granting of such new trial it would be governed by the federal statute permitting the same and not affected by the Arizona provision prohibiting the same. If appellant's contention is true, then a course of trials, verdicts and the granting of new trials would continue on indefinitely. Of course, such a proceeding is unreasonable and a district court should instruct a verdict in the first instance and the Arizona constitutional provision is not controlling.

The constitution of the state of Colorado provides that in libel cases the jury are the sole judges of both law and fact. In Seested vs. Post Printing & Publishing Company (1926) 15 Fed. (2d) 595, the United States District Court for the District of Colorado held that it was not required to follow such rule as a matter of procedure under the conformity act nor as being a rule of decision under Section 725; saying:

"Every litigant in the federal court has an inherent right to have the law of the case determined

by the judge. It is not hard to imagine why this right is most valuable and necessary for the protection of his property, as well as his liberty. If the jury were to declare the law, who could say in advance what the law on any given question is? The judge would, or should, at least, abstain from the responsibility of stating the law to them, and would not be justified in directing a verdict, irrespective of the weakness of the prosecution, or of the plaintiff's testimony, as the case might be. The inevitable result would be that the rights and liberties of our citizens would be determined by an irresponsible tribunal, ignorant of the law, instead of one trained in jurisprudence and disciplined by study and experience, or, to put it another way, by a tribunal that makes its own law, as distinguished from one that would follow the law impartially as laid down by statute, eminent jurists, or decided cases, irrespective of persons, times, or popular agitation."

A federal court will not take dictation from a state as to how it shall instruct a jury nor the manner of instruction; nor will it observe any state law relating to the administration of the judge in the discharge of his separate functions. The practice act of Illinois provides that a court in charging a jury shall instruct only as to the law of the case and shall not comment upon facts and makes further provision relative to the manner of instructing the jury and requiring that the instructions shall be taken by the jury in their retirement. Holding that such a law is not binding upon a federal court, the Supreme Court of the United States in Nudd vs. Burrows (1875) 91 U. S. 426 said:

"The personal conduct and administration of the judge in the discharge of his separate functions

is, in our judgment, neither *practice, pleading*, nor *a form* nor *mode of proceeding* within the meaning of those terms as found in the context. The subject of these exceptions is, therefore, not within the act as we understand it.

"There are certain powers inherent in the judicial office. How far the legislative department of the government can impair them, or dictate the manner of their exercise, are interesting questions; but it is unnecessary in this case to consider them."

The Supreme Court has affirmed the rule laid down in the Nudd case in the following:

Indianapolis & St. Louis R. R. Co. vs. Horst, (1876) 93 U. S. 291;

Vicksburg & Meridian R. R. Co. vs. Putnam, (1886) 118 U. S. 545;

St. Louis, Iron Mtn. & So. Ry. vs. Vickers, (1887) 122 U. S. 360;

Lincoln vs. Powell, (1894) 151 U. S. 436.

Other instances in which the courts of the United States have refused to follow state rules or decisions are:

In determining the sufficiency of facts to constitute negligence or contributory negligence they will not follow the state law but will be governed by federal rules.

So. Ry. Co. vs. Smith, (1914) 214 Fed. 942;

Conrad vs. Wheelock, (1928) 24 Fed. (2d) 996.

They will follow their own rules with respect to presumption and burden of proof without regard to state law.

Harmon vs. Barber, (1918) 247 Fed. 1.

They will set aside, vacate or modify their judgments at any time during the term although there is a state law to the contrary.

So. Pac. Co. vs. Kelley, (1911) 187 Fed. 937.

And they will not follow state statutes or decisions on questions of general or commercial law.

R. R. Co. vs. National Bank, 102 U. S. 14;
Bryant vs. Williams, (1926) 16 Fed. (2d) 159.

To enforce the provision of the Arizona Constitution in question a federal court would be allowing the state to dictate to a judge of a court of the United States the administration of his duties, which will not be tolerated.

CONCLUSION

The Circuit Court of Appeals for the Ninth Circuit has held that it appears from the evidence in this cause that the plaintiff, as a matter of law, was guilty of contributory negligence and that under the settled rule in the courts of the United States the defendant was entitled to an instructed verdict—it necessarily follows that if the case had been submitted to the jury and there had been a verdict for the plaintiff, under the provisions of 28 U. S. C. A. 391, the court would have been required to have granted defendant a new trial.

The question certified to this court, paraphrased is: Under these circumstances is a district court of the United States bound and controlled by section 5 of article 18 of the Constitution of the State of Arizona and thereby prohibited from instructing a verdict on the grounds of contributory negligence, although the evidence

establishing such negligence is uncontroverted and conclusive?

We submit that such question should be answered in the negative. It is not a *rule of procedure* required to be followed under the Conformity Act, but on the contrary is a matter of substantive law; nor is it a *rule of decision* under the provisions of section 721 Revised Statutes of the United States. On the contrary, it is nothing more than an attempt to dictate to courts of the United States what function shall be exercised by the judge and what function by the jury—it is an attempt to dictate to a federal judge the administration of his functions, and an endeavor to limit and restrict the granting of new trials in a court of the United States. This should not be tolerated.

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